(17)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 630.

EDWARD G. BUDD MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BY PETITIONER TO BRIEF FOR THE BOARD IN OPPOSITION TO THE WRIT.

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CASE CITED IN REPLY BRIEF.

REPLY BY PETITIONER TO BRIEF FOR THE BOARD IN OPPOSITION TO THE WRIT.

The Brief for the Board in Opposition to the Writ, by deftly stretching the Board's primary findings of fact (R. pp. 1098a to 1107a), some more, some less, seeks to make them add up to sufficient to support the Board's conclusions (R. pp. 1107a to 1112a) of actual domination of and effective interference with the Association. To demonstrate the fallacy of the Board's argument would therefore require a detailed analysis of the Board's findings much more lengthy than would be proper in the present reply. Despite the Board's present statements to the contrary, the five important questions specified in the petition for the writ are squarely presented in this case.

To give a few illustrations of how, in the brief filed in opposition, the Board's primary findings have been misconstrued:

On pages 3 and 16 of the Brief in Opposition it is contended that the request by the employees to management to assist them in the preparation of the Proposed Plan was solely for the benefit of the 85 employees in the shipping department, whereas the Board found (R. pp. 1098a to 1099a), basing its finding on the testimony of the Board's witness Alminde (R. pp. 150a to 154a) that at the meeting of August 24th the shipping employees, after discussing the matter amongst themselves in the absence of the management representatives, "requested that the management combine the draft (of the plan in use by another company) with certain ideas expressed by the shippers, present it to the employees, and hold an election to select representatives *from the entire plant* to consider the suggested plan of employee representation."

On page 3, the purported summary of the Board's findings as to Sullivan's reading the plan in effect at another plant is framed to give the impression that Sullivan imposed this plan on the men as the basis of the discus-

sion. The uncontradicted testimony referred to in the Brief in Opposition (R. pp. 152a-153a, 610a, 722a-723a) together with that of Alminde on page 151a, was, however, that *before* the meeting of August 24th, Alminde had told Sullivan "exactly what the men had in mind as regards their desires of organization" (151a); that *at* the meeting Alminde told Sullivan "that we knew similar plans of organization were existent in other parts of the automobile industry," (R. pp. 152a, 220a); and that it was *then* that Sullivan produced the plan, asked if the men wanted to have it read, and on their saying that they did, read it and left it with them when the management representatives retired. (R. pp. 152a-153a.).

Contrary to the inference from pages 4-5 of the Board's Brief, the Proposed Plan was drawn up with frequent discussions with Alminde (R. pp. 1099a; 156a-157a). The Board did not find that anything went into the Proposed Plan except what the men asked to have in it.

The Board contends (p. 4) that the Proposed Plan was put into effect by the Company's "*unilateral*" action on September 5, 1933, providing for the election. This, however, as found by the Board, was the direct result of the employees' request.[1]

On page 5, the Board states: "Efforts by the representatives to amend the Plan were blocked by the management, exercising its veto power, on the ground that it wished to retain a 'guiding hand' in the Association." What the Board found, however, was (R. pp. 1101a to 1103a) that at one of the early meetings with the employee

[1] Contrary to the statement in note 4 on page 5 of the Board's Brief, Petitioner maintains and will argue to this Court that although in the fall of 1933 the Company bargained with the 19 representatives, the Employees Association was not formed until accepted by the employees at the March election. No one but the members can form an association.

representatives, the management expressed a desire to have a "guiding hand" in the association in order that the association might not "do something foolish", and asked that changes in the plan be postponed. Admittedly, however, after November the management representatives made no further suggestions of this nature. Between November and March the employee Representatives thoroughly revised the Proposed Plan and, of their own volition or on the suggestion of William H. Davis, Compliance Director of the N. R. A., eliminated therefrom all provisions giving management any voice whatever in the operation of the association. Any attempted interference by the Company was therefore wholly ineffectual.

The Court's attention is particularly directed to the distinction between the Board's findings of the primary facts on pages 1098a to 1107a of its report and its conclusions from such findings on pages 1107a to 1112a.

Despite the innuendoes of coercion on page 6 of the Brief, the Board does not apparently now dispute our assertion that none of the employees responsible for or participating in the November "strike" by the AFofL Local were discharged or in any way discriminated against by the Company for their part in it.

The Brief stresses, as did the Board and the Court below, the fact that the Company for a time overlooked Wiegand's delinquencies, because he was a representative, as evidence of the Company's "parental treatment" of the Association. This conclusion, however, begs the question at issue by assuming that the Company's leniency was the result of parental solicitude rather than of genuine regard for the wishes of the men and respect for their organization. If Wiegand had been an officer of the CIO or the AFofL, the Company, for fear of being accused of discrimination, would have refrained from discharging him until certain, not only of his guilt, but also of its ability to demonstrate this. A local officer of one of these organ-

izations can normally get away with about four times as much dischargable conduct, and a known member with about twice as much, as a non-union employee. The fact that the Company behaved toward Wiegand as it would have had he been an officer of one of the national unions is relied on as showing that the association was a mere "sham," whereas in reality it showed respect for the association as the genuine representative of the men.

With regard to the Board's finding that the petitioner discharged Wiegand and Davis because of their membership in the CIO, the Board refers to no substantial testimony which would justify the conclusion that the company knew that these men were members of the CIO. Wiegand had concealed this fact, even from his fellow employees, until a day or two before he was discharged. The only testimony relied on as to him was his statement as to what employee representative Mullen (not a company officer or supervisor) had told him; and as to Davis, that after his layoff he had distributed CIO literature at the plant gates (of which the company admittedly had a number), without any testimony, even from Davis himself, that any company supervisor who knew Davis saw him do so.

It is true that the Board in the present case "conclude and find (R. p. 1111a) that since July 5, 1935, the Company dominated and interfered with the administration of the Association and has contributed financial support to it," in the language of the Act. So did the Board find in the case of *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, where this Court, on examination of the Board's primary findings, held that these did not legally justify the Board's conclusion, since the Board had evidently relied on the employer's privileged address and communication. Similarly, in the case at bar, it is the function of the Court both to determine whether the Board's primary findings are supported by substantial evidence, and whether the primary findings, so supported, justify the Board's ultimate conclusion.

While the Board's powers in finding the facts are admittedly very broad, such powers are confined to the findings of actual facts and do not extend to the drawing of legally erroneous conclusions from the findings of fact. Even the Board cannot make 2 and 2 add up to 5.

Respectfully submitted,

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